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No. 89-1681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BOARD OF EDUCATION OF TOPEKA,
SHAWNEE COUNTY, KANSAS,

Petitioner,

vs.

OLIVER BROWN, et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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1. Respondents, like the court of appeals, erroneously attempt to freeze liability of the school district for court supervised desegregation as of 1954. In their introduction, respondents wrongfully assert that Topeka is unique because it has never had a court-imposed desegregation plan. This ignores approval of a desegregation plan following remand from this Court in 1955. *Brown v. Bd. of Educ.*, 139 F.Supp. 468 (D. Kan. 1955). More importantly, it ignores the district's completion in 1981 of HEW-approved desegregation plans. Respondents do not even mention the HEW plans. Rather, respondents selectively review pre-1981 events, thereby developing the completely erroneous impression that the court of appeals affirmed the controlling factual findings of the trial court. This is not so. This approach is most obvious in the respondents' discussions of eight factors:[1]

The **school closings** discussed by respondents occurred in the 1950's and 1960's. The district court found that "the school closings over *thirty* years in the district indicate a policy of desegregation." App. 25a (emphasis added). The court of appeals reversed. App. 80b-81b.[2]

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[1]See Respondents' Brief in Opposition, 2-5. (Hereinafter Res. Brief).

[2]Judge Baldock thoroughly analyzed the errors in the respondents' and majority's analysis of attendance statistics for Highland Park North (App. 143c-145c), Lafayette (App. 145c-150c), and Quinton Heights (App. 151c-161c).

As to **school openings**, the district court concluded, "In sum, it does not appear that the district's school construction policy has promoted segregated residential patterns or segregated schools." App. 28a. The court of appeals reversed. App. 79b.[3]

As to **school boundaries**, the district court held that "[a] review of the school boundaries as they have developed over *thirty* years does not reveal a segregative pattern that remains today." App. 29a. (emphasis added). As to boundaries[4] drawn around the former *de jure* black elementary schools, the district court held that "the schools have long been closed and the segregative effects of those boundaries have attenuated entirely." *Id.* The court of appeals reversed. App. 77b.

All **optional attendance zones** were eliminated in 1976. App. 23a; App. 46b n.53. The district court

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[3]See dissent at App. 171c-175c.

[4]The district court found that the student minority percentage of students at Lowman Hill has been within fifteen percent of the district average within recent years, and therefore the school is not racially identifiable. App. 30a. The court of appeals nevertheless found Lowman Hill to be "the most serious example of segregative attendance boundaries." App. 76b. See dissent at App. 161c-167c.

The district court rejected plaintiffs' contention that Quinton Heights was a "black school" bordering on a "white school." App. 52a. The court of appeals found the Quinton Heights boundaries to be manipulated (App. 85b), thereby reversing the district court finding that "attendance zones are not segregatively gerrymandered." App. 32a. The dissent fully examined the majority's errors (App. 84b-86b) regarding Quinton Heights. App. 151c-161c.

found that "any segregative effect of the zones was slight and does not remain today." *Id.* The court of appeals merely stated, "Plaintiffs introduced evidence tending to show . . . optional attendance zones served to maintain segregation." App. 61b.

The district court found that there is no showing that **space additions** caused current racial imbalances. App. 24a-25a.[5] The court of appeals held that the additions "did not further the process of desegregation." App. 40b.

With respect to **alternative decisions**, the district court found that 1984 plans, which would have eliminated all majority minority schools, were not adopted because of uniform and vigorous negative public reaction. App. 52a-53a. Further, it stated that although "[a]t any time, more could have been done to achieve racial balance, . . . it begs the issue of this case to argue that racial balancing must be done today because it was not done yesterday." App. 54a. Even the court of appeals refused to adopt plaintiffs' position that the failure to adopt the reorganization plans evidenced absence of commitment to desegregation. App. 67b n.75.[6]

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[5]According to plaintiffs expert, space additions were used at predominantly white, predominately nonwhite, and racially balanced schools. App. 24a. "[S]chools are [not] racially imbalanced today because of space additions." App. 25a.

[6]The dissent concludes, "[T]he failure of Topeka to adopt Reorganization Plans should count for nothing in this case." App. 80c.

The district court rejected the allegation of a correlation between minority **faculty and staff** assignment and high minority student population (App. 40a-43a), finding that "the district's approach to faculty and staff is not indicative of a dual system of education." App. 43a. The court of appeals reversed, finding such correlation "clear". App. 54b.[7]

As to **present conditions**, the district court concluded that the school district has "proven by preponderance of the evidence that [it] is a unitary school system" (App. 14a) and that "statistics indicate the students in U.S.D. #501 are not separated by race." App. 20a. The court of appeals reversed. App. 49b.[8] As to faculty and staff assignment, the district court found that "all of the schools have been within the ±10% range in the last ten years" (App. 43a), and that such assignment did not "serve to identify schools as intended for black or white students." *Id.* The court of appeals reversed. App. 72b-74b.[9]

The "dramatically different legal conclusions" (Res. Brief 6) are based upon diametrically different

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[7]As the dissent points out, the majority, when finding that faculty/staff assignment remains segregated relied "in part upon the extremes of the data." App. 125c. The majority's factual finding is identified as "radical" given the numbers involved. App. 131c.

[8]Student assignment is discussed by the dissent at App. 93c-112c.

[9]Faculty and staff assignment is discussed by the dissent at App. 112c-131c.

interpretations of the factual record. There is no "general agreement on the facts." (*Id.*) The factual findings were not "largely affirmed." (*Id.*, 2).

2. Respondents identify two supposed erroneous legal rulings of the trial court which allegedly explain the divergent results of the two courts. The first is the ruling "that Topeka's failure to desegregate was excused because, in the early 1950's, the school district adopted a neighborhood school system." (Res. Brief 6-7). This characterization is erroneous. The trial court did not excuse a failure to desegregate. The schools are integrated and "free of the characteristics of *de jure* segregation." App. 57a. "[S]ubstantial integration" resulted from the adoption of the race neutral neighborhood school attendance system in the 1950's. App. 53a. After *Green* and other decisions of this Court "encouraged race-conscious efforts to eliminate vestiges of segregation" and HEW "challenged the progress of desegregation," additional action was then taken to improve racial balance. App. 53a-54a. The trial court "looked beyond the neighborhood school plan for segregative effect, thoroughly analyzing quantitative measures of racial composition." App. 72c.

The second district court "error" claimed by respondents is that plaintiffs were required "to show that actions taken by the School Board between 1951 and the time of trial were intentionally segregative." Res. Brief 7. Again, respondents mischaracterize the district court's analysis. It correctly considered intent

as necessary to the finding that the district satisfied its burden to show the schools are unitary.[10] Intent was considered relevant to the unitariness issue, but not controlling. App. 8a. "The intent inquiry is inclusive of whether a school board has acted affirmatively, not merely neutrally, to eliminate a dual system existing in 1954." App. 13c. Intentional segregation is required to impose liability for violation of the Equal Protection Clause and Title VI. The court did not impose the burden on plaintiffs to show the presence of segregative intent; rather it imposed on defendant the burden to show the *absence* of segregative intent.[11]

Both "errors" claimed by respondents are included within the questions presented by the petitioner. Determination of the substantive criteria of unitary

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[10]The district court held a system is unitary if "the characteristics of the 1954 dual system do not exist or, if they exist, are not the result of past or present *intentional* segregative conduct of defendants or their predecessors." App. 8a (emphasis added).

[11]The trial court said the following regarding burden of proof:

> Plaintiffs have the burden of proving that a legal segregation exists in U.S.D. #501. Whether the burden of proof should shift to the defendants to prove that illegal segregation does not exist, because of the history of intentional segregation within the district or because or racial imbalances in the schools' student bodies today, is a difficult question. . . . Regardless of the operation of these presumptions, the court believes defendants have proven by a preponderance of the evidence that U.S.D. #501 is a unitary school system.

App. 14a.

schools will require consideration of the effectiveness and sufficiency[12] of Topeka's evolving neighborhood school attendance policy. Which party has the burden of proof regarding intent is central to the resolution of the second question presented. Respondents by raising that these "errors" confirm the importance of the questions presented.

3. Respondents are wrong when arguing the decision below represents a straightforward application of well-settled legal principles. The "rule" of *Davis v. Bd. of School Comm.*, 402 U.S. 33, 37 (1971) arose in response to a challenge to the adequacy of the court approved desegregation plan. The presence of illegal segregation was not in issue. Here the Tenth Circuit transposed the *Davis* remedial standard into a substantive criteria of unitariness. It compounded this error by equating maximum practicable desegregation with ideal racial balance, rather than a multifaceted definition of desegregation consistent with this Court's recognition that the absence of unlawful segregation is not measured by statistics alone. None of the twenty cases cited by respondents (Res. Brief 10-11) adopts the *Davis* standard as a substantive criterion of a unitary system.[13]

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[12]See Res. Brief 7, quoting *Keyes v. School Dist.*, 413 U.S. 189, 212 (1973). See also Pet. 15-16.

[13]The overwhelming majority of cases included in respondents' string cite (Res. Brief 10-11) concern evaluation of desegregation plans. The exceptions which follow also cite *Davis*, or the parallel language

Respondents do not deny[14] the existence of a conflict between the Tenth Circuit's second element of the *definition* of unitariness and the unitariness definitions adopted by the First, Fourth, Fifth, and Eleventh Circuits. Contrary to respondents' suggestion (Res. Brief 11 n.8), the Tenth Circuit did not consider the extent to which maximum practicable desegregation has been accomplished as merely evidence of a unitary system.[15]

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of *Swann*, for purposes other than defining a unitary system: *Pitts v. Freeman*, 887 F.2d 1438, 1446, 1448 (11th Cir. 1989) *pet. for certiorari filed* 58 U.S.L.W. 3530 (1990) (*application* of the definition of unitary status, the condition when the schools "no longer discriminate between school children on the basis of race"); *Davis v. East Baton Rouge Parish School Bd.*, 721 F.2d 1425, 1434 (5th Cir. 1983) (*Swann* quoted when discussing duty to eliminate one-race schools); *Price v. Denison*, 694 F.2d 331, 354, 356-57 (5th Cir. 1982) (*Davis* and *Swann* quoted as part of an extensive analysis of cases in support of the proposition that schools are not racially identifiable simply because of prior *de jure* status combined with racial imbalances as defined by the Foster formula); *United States v. South Park Ind. School Dist.*, 556 F.2d 1221, 1225 (5th Cir.) *cert. denied*, 439 U.S. 1007 (1978) (*Swann*'s discussion of one-race schools quoted when remanding for further findings of fact).

[14]Respondents' discussion is relegated to a footnote (Res. Brief 11 n.8) in which the definition of unitariness is not addressed.

[15]Also contrary to respondents' suggestion (Res. Brief 12), the court of appeals' finding that the school board had not fulfilled its duty to make every effort to achieve the greatest possible degree of desegregation was a primary basis for reversal. "The lack of evidence or any attempt to argue that further desegregation is impracticable is perhaps the largest flaw in the school district's case." App. 93b. Absent this additional element, if the court of appeals had affirmed the factual findings of the district court, as it was required to do by

The Tenth Circuit's analysis of the burden of proof is not a correct application of established legal principles. There is no opinion of this Court defining a prima facie case of illegal segregation in a formerly *de jure* system where, as a result of school desegregation plans, there are no one-race minority schools and the evidence of present segregation is highly disputed.[16]

The issue here is not whether statistics of student assignment and faculty and staff assignment are relevant, but what showing is necessary for plaintiffs to be entitled to rely upon a presumption that current imbalances are causally related to the intentional segregation in the elementary grades over thirty-five years ago. This is an issue of increasing importance.

4. This Court's resolution of *Board of Ed. v. Dowell*, No. 89-1080 will effect this case. *Dowell*, also from the Tenth Circuit, presents the question of whether the majority's utter disregard of the proper

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Anderson v. City of Bessemer City, 470 U.S. 564 (1985), it would have been compelled to hold that the Topeka schools are unitary.

[16]Neither *Green v. School Bd. of New Kent. Co., Va.*, 391 U.S. 430 (1968) nor *Keyes*, 413 U.S. at 209-11, nor *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526 (1979), the cases cited by respondents, presented this issue. When finding a prima facie case of current segregation, the court of appeals did rely nearly exclusively upon student assignment and faculty and staff assignment. See App. 45b-57b. The additional factors referenced to by respondents (Res. Brief, 13) at App. 58b-89b concern the analysis of the causal connection between current and past conditions, not evidence of current segregation.

roles of the trial and appellate courts warrants reversal. Respondents fail to address this question. Further, it has been suggested that *Dowell* cannot be fairly resolved without this Court addressing the standard by which a district may be declared unitary. See Brief of Amici Curie of the Counsel of the Great City Schools, et al., *Bd. of Ed. of Oklahoma City v. Dowell*, Case No. 89-1080.

CONCLUSION

In conclusion, the petitioners urge this Court to grant the review for the reasons stated in its petition and herein.

Respectfully submitted,

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